Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1642

MARK CHERAMIE, ET AL.
Appellants

versus

NUMA GUIDRY, ET UX.
Appellees

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

MARK CHERAMIE, ET AL.,
Appellants

VERSUS

NUMA GUIDRY, ET UX.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF
LOUISIANA

JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the Supreme Court of Louisiana, entered on December 19, 1977, rehearing denied February 17, 1978, reversing the decision of the Louisiana Court of Appeal for the First Circuit, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The unanimous opinion of the Louisiana Supreme Court and the per curiam denial of rehearing are reported at 354 So.2d 1280 (La. 1978), and are set forth in Appendices D, p. A-19 and E, p. A-23.

JURISDICTION

Appellees applied to the Louisiana Supreme Court for a writ of certiorari to review that portion of the decision of the Louisiana Court of Appeal for the First Circuit which invalidated a judicial sale.

Appellants argued before the Louisiana Supreme Court on application for rehearing that the Due Process Clause of the Fourteenth Amendment to the United States Constitution made unlawful the judicial sale of property without prior notice of the sale and the underlying default judgment.

The jurisdiction of the United States Supreme Court to review the decision of the Louisiana Supreme Court by direct appeal is conferred by Title 28, United States Code, Section 1257(2). Cases sustaining the jurisdiction of this Court are *Cohen v. California*, 403 U.S. 15 (1971) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

In the event it should be determined that an appeal does not lie in the instant case, appellants respectfully request that these papers be regarded and acted on as a petition for a writ of certiorari in accordance with the provisions of Title 28, United States Code, Section 2103. *DeFunis v. Odegaard*, 414 U.S. 1038, 94 S.Ct. 538, 38 L.Ed.2d 329 (1974).

QUESTIONS PRESENTED

1. When a state statute explicitly requires personal notice, is the Due Process Clause of the Fourteenth Amendment to the United States Constitution satisfied by newspaper notice to co-owners of property that a default judgment of partition

has been entered against them and their property is about to be sold at public auction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment XIV, Section 1, to the United States Constitution and Articles 1231-1234, 1913, 1974, 2087 and 2123 of the Louisiana Code of Civil Procedure, the texts of which are reprinted in Appendix G, p. A-27.

STATEMENT OF THE CASE

Appellants, appellees, and others inherited from their parents approximately 54 acres of land on Bayou Lafourche in Lafourche Parish, Louisiana. Under Louisiana law each became an owner of an undivided interest in the inherited property, a form of ownership analogous to a common law tenancy in common.

Appellees filed suit against nine co-owners of the property, as Louisiana law provides, seeking a judicial sale of the property and division of the proceeds among the co-owners. In Louisiana law this action is called "partition by licitation."

The complaint or petition commencing the partition suit was filed in the 17th Judicial District Court for Lafourche Parish on April 10, 1973. The five appellants were among six co-owners who received domiciliary service[1] between April

1. Louisiana law distinguishes between personal and "domiciliary" service of process. See Louisiana Code of Civil Procedure Articles 1231-1234. Specifically, domiciliary service is made at the residence of the person to be served on any person other than the person to be served who is "of suitable age and discretion."

and December of 1973. The remaining three co-owners were served personally in April, 1973 and January, 1974.

Appellees took a default judgment against appellants which was confirmed on November 5, 1974. Louisiana law requires personal or domiciliary service of a notice of judgment when a petition has not been served personally. Article 1913 of the Louisiana Code of Civil Procedure reads in pertinent part:

> Notice of the signing of a default judgment against a defendant on whom citation was not served personally, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service.

No notice of the default judgment partitioning their inheritance was served on any of the appellants. On the very day the judgment was confirmed, at appellees' request, the Clerk of Court issued to the Sheriff of the Parish a commission to sell the partitioned property at public auction. After legal advertisement in a local newspaper, the property was sold to appellee Numa J. Guidry and his two sons on December 11, 1974, only a few weeks after the default judgment was confirmed but more than a year and a half after appellees initiated the partition suit.

Louisiana procedure requires that public sales of property be finalized, or "homologated," by the Court under whose auspices the sale was conducted. At the homologation proceeding, appellants moved the trial court to declare the original default judgment of partition as well as the subsequent judicial sale null and void. The trial court upheld the judg-

ment of partition but granted appellants' request to overturn the judicial sale because the co-owners had not been served with notice of the judgment in direct contravention of Article 1913 of the Louisiana code of Civil Procedure. (See Appendix G, p. A-28.)

The court ordered that the notice required by article 1913 be sent to Appellants and that a new judicial sale be held. The parties filed cross-appeals to the Louisiana Court of Appeal for the First Circuit. Appellees appealed that portion of the District Court's decision that nullified the original sale and ordered that a new sale be held. Appellants appealed the trial court's decision upholding the judgment of partition. The Court of Appeal affirmed the judgment of the trial court in both respects. (See Sppendix B, p. A-4)

Thereafter appellees petitioned the Louisiana Supreme Court for a writ of certiorari from the judgment of the Court of Appeal. The Supreme Court granted certiorari, and, reversing both lower courts, sustained the original judicial sale. The Supreme Court acknowledged that failure to give appellants notice of the judgment of partition rendered the judicial sale "premature", but held that such "prematurity" does not invalidate a judicial sale under Louisiana law. (See Appendix E, p. A-23) In thus flatly disregarding the requirements of Article 1913, the Supreme Court for the first time concretely threatened that Louisiana law would permit appellants' property to be sold at public auction with only newspaper notice to appellants.

Appellants then argued on application for rehearing that Louisiana partition procedure, as construed by the Louisiana Supreme Court, deprived appellants of property without due process of law in violation of the Fourteenth Amend-

ment. The Supreme Court, however, denied the application for rehearing, thereby rejecting appellants' constitutional argument. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

The issue raised by appellants is rooted in fundamental elements of due process of law. Their predicament leaves them with no recourse other than the protections afforded individual liberty and property by the Fourteenth Amendment's Due Process Clause. As the Court stated in *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)-

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.

1. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ITS TESTS FOR ADEQUATE NOTICE ARE APPLICABLE TO THIS CASE.

The Louisiana Supreme Court's decision denied appellants the procedural protection explicitly set forth in Article 1913 of the Louisiana Code of Civil Procedure and validated a judicial sale of property without that statutorily required notice to six of the co-owners of the property. Appellants maintain that any proper reading of the Due Process Clause must construe this decision of the Louisiana Supreme Court as denying even minimal due process.

Appellants were seriously harmed by their failure to receive notice of the default judgment as required by the

Louisiana Code of Civil Procedure Article 1913. Without notice of the judgment, they had no notice of the impending judicial sale. Timely service of a notice of judgment involving partitioned property is designed to enable those against whom the judgment of partition was taken to raise any of the permissible challenges to the judgment or to see that the public auction is properly conducted and to attend the sale and participate in the bidding to purchase the property themselves or, at the very least, insure that the proerty sells for a fair price.

This case clearly satisfies the requirements for application of the Due Process Clause.[2] At issue is ownership of real property. Unquestionably the rights involved have always been contemplated as falling within the sphere of due process protection. "[A]ctual ownership of real estate, chattels, or money," have long been recognized as the most basic, although not the only, property right protected by the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, at 571-572 (1972).

This is only the threshold inquiry, for

> [o]nce it is determined that due process applies the question remains what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

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2. The requirement of state action is met by the participation of the Louisiana judicial system in the proceedings which resulted in the decree of partition and the commission for the judicial sale. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, (1969). The sale itself was conducted by the Office of the Sheriff of the parish.

2. NOTICE REASONABLY CALCULATED TO APPRISE INTERESTED PARTIES OF THE ACTION IS A REQUIREMENT OF DUE PROCESS AND WAS NOT SATISFIED BY ANY OF THE ACTIONS TAKEN IN THIS CASE.

Modern case law is unequivocal in its insistence on notice as a fundamental safeguard of appellants' rights in their property. In *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950), this Court analyzed the relationship between notice and due process of law. As the Court stated, 339 U.S. at 314:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.]

Mullane concluded that service by newspaper publication of a petition for judicial settlement of accounts to those beneficiaries of a common trust fund whose addresses were known or readily ascertainable failed to satisfy due process. Several subsequent cases have also found notice by newspaper publication inadequate. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), and *Schroeder v. City of New York*, 371 U.S. 208 (1962), involved state condemnation proceedings and both found notice by publication resulted in an unconstitutional deprivation of property without due process of law.

As the Court stated in *Walker*, 352 U.S. at 116:

> Measured by the principles stated in the Mullane Case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property . . . In the present case there seem to be no compelling or even persuasive reasons why such direct notice [personal notice to interested parties] cannot be given.

Walker concerned notice only of a hearing to determine the value of the condemned property. Under no circumstances would the owner have been able to keep the property in question, whereas appellants here complain of lack of notice of a judicial sale in which they might have been able to purchase full ownership of all the acreage.

In 1908, this court found notice by publication of tax foreclosure proceedings valid under the due process clause. *Longyear v. Toolan*, 209 U.S. 414 (1908). The Court espoused a "caretaker theory," which virtually created a legal presumption that an owner of property who had failed to pay his taxes would expect and watch for publication of a notice of judicial sale of that property.

Mullane, *Walker* and *Schroeder* represent the modern trend which rejects the caretaker theory and requires personal notice of impending deprivations of property. Only under the caretaker theory, however, could notice by publication be found to satisfy the requirements of the Due Process

clause.[3] See also *Covey v. Town of Somers*, 351 U.S. 141 (1956).

Here domiciliary service of the petition for partition also cannot be construed as notice of the subsequent judgment and judicial sale and fails to provide due process of law for the following reasons. None of the appellants answered the complaint or made an appearance of any kind in the proceedings. In fact, appellees took a default judgment against appellants. Since the record reveals no evidence that six of the co-owners of the property actually received the complaint, appellees cannot argue under the "caretaker theory" that domiciliary service of the complaint should have given appellants notice of an impending judicial sale of their property.

The absence of notice in this case is all the more egregious because it violated the clear requirements of Article 1913 of the Louisiana Code of Civil Procedure. The Louisiana legislature itself recognized in its enactment of Article 1913 that further safeguards of property rights are required when there has been no personal service of the complaint and no appearance by a defendant. In those circumstances and under the flexible approach of *Mullane*, due process requires service of a notice of judgment prior to a judicial sale of property. No strict rule of notice satisfies due process in all situations. *See also Schroeder v. City of New York*, *supra*, 371 U.S. at 211-212.

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3. In *Dow v. State of Michigan*, 240 N.W. 2d 450 (Mich. 1956), the Michigan Supreme Court held that *Longyear* and the caretaker theory have been effectively overruled by *Mullane* and subsequent cases and that notice by publication of a tax sale did not satisfy due process requirements.

More recent decisions of this Court confirm that prior notice of a deprivation of property is required by the Due Process Clause. *Sniadach v. Family Finance Corp.*, *supra*, considered the question of "whether the interim freezing of wages without a chance to be heard violates procedural due process." 395 U.S. at 340. Despite the fact that the individual deprived of her property would have the property returned to her if she proved her case on the merits, the Court found that losing the use of the property without prior notice and a hearing violated her due process rights.

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process. 395 U.S. at 342.

Here appellants' loss of property will be permanent if the judicial sale is not set aside and requires procedural protection at least on a par with that required in *Sniadach*.

Likewise, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), support appellants' due process contentions. *Fuentes* and other cases decided simultaneously considered state procedures for summary seizure and recognized a due process property interest even in household goods. The Court saw potential for serious abuse of some of these procedures and the need for some safeguards even though the appellants in *Fuentes*, etc., had purchased the goods under conditional sales contracts and, therefore, lacked full ownership; 407 U.S. at 86:

> The Fourteenth Amendment's protection of "property," however, has never been interpreted to

> safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," *Boddie v. Connecticut*, 401 U.S. at 379 including statutory entitlements. [Citations omitted.]

Appellants here had undisputed actual ownership, although in common with others, in the property in question. Yet even in *Fuentes* where property ownership was disputed and where the property would be returned if a subsequent adjudication of rights resolved the dispute in favor of the purchaser of the household goods, the Court held that some procedural due process was required by the Fourteenth Amendment, 407 U.S. at 79:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233 [Other citations omitted.]

In *Mitchell*, the Court not only reaffirmed the requirement of notice set forth in *Fuentes* but also emphasized that Louisiana's statutory procedural protections had been strictly followed. See also, *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

There are no competing interests at stake here. The appellees' only interest in denying to appellants prior notice of the judgment and sale would have been an illegitimate interest in buying the property for themselves at a lower price.

Appellants' interest in the property in question requires that they be afforded notice of the default judgment against them which would alert them of the impending judicial sale. Due process requires that such notice be served upon individuals who have received only domiciliary service of the complaint. Any other form of notice is not reasonably calculated under the circumstances to apprise a defendant of the impending deprivation of his property.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted. In the event these papers are regarded by this Court as a petition for a writ of certiorari, it is requested that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

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Attorneys for Appellants, Mark Cheramie, et al.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Jurisdictional Statement have been served on M. Arnaud Pilie, 204 Richards Building, New Orleans, Louisiana 70112, this 17th day of May, 1978.

_____

Charles M. Lanier

APPENDIX A - JUDGMENT OF 17TH JUDICIAL DISTRICT COURT

NUMA GUIDRY, ET UX	17TH JUDICIAL DISTRICT COURT
VS. NO. 29,485	PARISH OF LAFOURCHE
MARK CHERAMIE, ET AL	STATE OF LOUISIANA

JUDGMENT

The Rule to Show Cause Why Partition Should Not Be Homologated, the Opposition to Homologation of Partition, and the Motion to Declare Inventory, Judgment, Clerk of Court's Commission and Sheriff's Sale Null and Void and of No Legal Effect came on for hearing on January 15, 1976, pursuant to previous fixing, there being present:

WALTER I. LANIER, JR., attorney for defendants, Alzire Cheramie Lefort, Elie Cheramie, Mark Cheramie, Betsy Cheramie Ayo, Russell A. Cheramie, Annette Cheramie LeLoup, Teddy Cheramie and Patricia Cheramie; and

M. ARNAUD PILIE, attorney for Dick J. Guidry and Robert J. Guidry; and

STANLEY L. PERRY, attorney for Numa J. Guidry;

For written reasons for judgment this day assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Alzire C.

Lefort, Elie Cheramie, Betsy C. Ayo, Mark Cheramie, Russell A. Cheramie, Annette Cheramie LeLoup, Teddy Cheramie and Patricia Cheramie, and against plaintiffs, Numa Guidry and Mercedes Guidry, rejecting and denying homologation and approval of the partition, and dismissing the rule to show cause filed herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Numa Guidry and Mercedes Cheramie Guidry, and against defendants, Alzire C. Lefort, Elie Cheramie, Betsy C. Ayo, Mark Cheramie, Russell A. Cheramie, Annette Cheramie Le Loup, Teddy Cheramie and Patricia Cheramie, denying, rejecting and dismissing defendants' Exception of No Right and/or Cause of Action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion filed by defendants to have the Judgment rendered on November 5, 1974 declared null and void and of no legal effect and ordered stricken from the conveyance records of the Parish of Lafourche, State of Louisiana, be, and it is denied, rejected and dismissed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for a New Trial filed by defendants herein, be, and it is denied, rejected and dismissed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the commission to sell to effect a Partition by Licitation issued by the Clerk of Court of the Parish of Lafourche dated November 5, 1974, be, and it is declared null, void and of no legal effect; and

IT IS FINALLY ORDERED, ADJUDGED AND DE-

CREED that the Sheriff's Sale and Deed dated December 11, 1974, and duly recorded in the conveyance records of the Parish of Lafourche, State of Louisiana, on the 18th day of December, 1974, in Conveyance Book 530, folio 22, under Entry No. 398,865, be, and it is declared null, void and of no legal effect, and the Clerk of Court of said parish is hereby ordered to strike, erase and completely cancel from the conveyance records of the Parish of Lafourche, State of Louisiana, said Sheriff's Sale and Deed dated November 5, 1974, and recorded in Conveyance Book 530, folio 22, Entry No. 398,865.

JUDGMENT RENDERED, READ AND SIGNED in Chambers at Houma, Louisiana on this 20th day of September, 1976.

s/ Wilmore J. Broussard, Jr.
DISTRICT JUDGE

FILED:
Sep 20, 1976
s/ O.J. Bourgeois,III
Dy Clerk of Court

(SEAL)
A TRUE COPY
Clerk of Court's Office
Thibodaux, La. Sept. 22, 1976
s/ O.J. Bourgeois,III
Dy. Clerk of Court

APPENDIX B - ORDER AFFIRMING JUDGMENT OF TRIAL COURT

NUMA GUIDRY, ET AL. NUMBER: 11,224

VERSUS FIRST CIRCUIT

MARK CHERAMIE, ET AL COURT OF APPEAL

STATE OF LOUISIANA

GLC
CLS
LOTTINGER, J. - Concurs & dissents and assigns written reasons

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT, PARISH OF LAFOURCHE, STATE OF LOUISIANA, HONORABLE WILMORE J. BROUSSARD, JR., JUDGE.

BEFORE: SARTAIN, COVINGTON AND LOTTINGER, JJ.

Mar 21, 1977

COVINGTON, JUDGE.

This is a suspensive appeal from a judgment setting aside the judicial sale in the partition suit and denying the homologation of the partition; the judgment also rejected the opponents' attack on the validity of the partition judgment. The opponents answered the appeal.

The facts are not in dispute, having been jointly stipulated by the parties. The suit arose over a partition by licitation of the subject property, which had been acquired by Leoca

Cheramie and Euzide Adams Cheramie during their marriage, by deed dated August 7, 1901. Both of them died intestate, he in 1953 and she in 1959, and their successions have not been opened. Their sole forced heirs are five children and the six children of a pre-deceased son. Their estate was comprised of the subject property, situated in Lafourche Parish, Louisiana.

Subsequently, Numa Guidry and his wife, Mercedes Guidry, who was one of the Cheramie daughters, brought a suit for partition by licitation of the subject property on April 10, 1973, against the other nine co-heirs, Mark Cheramie, Alzire Cheramie Lefort, Elie Cheramie, Annette Cheramie LeLoup, Teddy Cheramie, Patricia Cheramie, Betsy Cheramie Ayo, Russell A. Cheramie, and Carolyn Cheramie LaPlante. At the time of the partition suit, Numa Guidry owned an undivided 1/6 interest in the subject property, which he had purchased from Odeia Cheramie Pierce, one of the Cheramie heirs; and Mercedes Cheramie Guidry owned another undivided 1/6 interest which she acquired by inheritance from her parents. Three of the defendants in the partition suit were served by personal service; the others were served by domiciliary service.

The defendants in the partition suit filed no pleadings, and on June 21, 1974, a preliminary default was entered against all defendants. The default was confirmed on November 5, 1974. Notice of the default judgment was not served on any defendant.

On the same day on which the default judgment was signed, the plaintiffs sought to execute the judgment and they had the clerk of court issue a commission to the sheriff to sell the property.

After advertisement, the property was sold at public auction on December 11, 1974, to Numa Guidry, Robert J. Guidry and Dick J. Guidry for the sum of $40,000.00.

When the partition came on for homologation, the defendants filed opposition. One of them, Carolyn Cheramie La Plante, withdrew her opposition on November 11, 1975. Two purchasers of the property at the sale, Dick J. Guidry and Robert J. Guidry, filed an exception of no right and no cause of action to the opposition.

The matter came on for hearing, and judgment was rendered on September 20, 1976. This judgment is now on appeal.

The trial court found that defendants, Annette Cheramie LeLoup, Elie Cheramie, Mark Cheramie and Alzire Cheramie Lefort, had been served in the partition suit by domiciliary service,[1] and that no notice of judgment had been served on these defendants. The trial court then held that under the law the delays for application for a new trial and the taking of a suspensive appeal did not begin to run against these defendants until such time as they were served with notice of judgment as required by LSA-C.C.P. art. 1913. Since there was no notice of judgment served on these defendants, and the legal delays had not expired, the partition judgment confirmed against them on November 5, 1974, was not executory and final and the judicial sale was, thus, premature. The trial court then concluded the sheriff's sale, being an attempted execution of a judgment that was not executory, was null and void.

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1. The record also reflects that domiciliary service was made on Patricia Cheramie.

It is elementary that until a judgment becomes, or is made, executory, no execution of the judgment can be effected. Only a judgment in an executory status may be enforced.

Therefore, we must determine whether, on the established facts in the instant case, the default judgment was an executory judgment when the plaintiffs in the partition suit proceeded to have it executed.

The partition proceeding is governed by the procedural rules regulating ordinary proceedings with reference to default judgments, motions for new trial, appeals, appropriate delays, notice of judgments and execution of judgments, as far as practicable. LSA-C.C.P. art. 4603.

Article 4603 expressly provides, in part:

> "Except as otherwise provided by law, a partition proceeding is subject to the rules regulating ordinary proceedings."

Code of Civil Procedure article 4607 provides:

> "When a partition is to be made by licitation, the sale shall be conducted at public auction and after the advertisements required for judicial sales under execution. . . ."

The comments under this provision refer back to the general rules, beginning with LSA-C.C.P. art. 2331, which are applicable to judicial sales under fieri facias, the writ used to execute money judgments. See LSA-C.C.P. art. 2291.

Thus, the judgment by default in a partition proceeding

must be taken in accordance with the rules set out in LSA-C.C.P. arts. 1701-1703, 1843.

Specifically, the notice of judgment requirements of LSA-C.C.P. art. 1913 are applicable.

LSA-C.C.P. art. 1913 provides as follows in part:

> "Notice of the signing of a default judgment against a defendant on whom citation was not served personally, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service."

LSA-C.C.P. art. 2252 provides as follows:

> "A judgment creditor may proceed with the execution of a judgment only after the delay for a suspensive appeal therefrom has elapsed."

Although the article uses the words "judgment creditor" this is an illustration, rather than restrictive, description of the party in whose favor the judgment was rendered. The provisions of this article were not intended to be limited to the party in whose favor a *money* judgment was rendered; they apply to *any* judgment obligee.

In the instant case the default judgment was taken against defendants who had been served by domiciliary service and who were mandatorily entitled to notice of judgment under LSA-C.C.P. art. 1913. The delays for applying for a new trial did not begin to run until such notice of judgment was served.

The record reflects that at the time that the execution of the partition judgment was sought no notice of judgment had yet been served. Consequently, the delay allowed for applying for new trial had not begun to run. LSA-C.C.P. art. 1913. LSA-C.C.P. arts. 1974 and 2123 in effect provide that the delay for suspensively appealing does not begin to run until the expiration of the delay allowed for applying for new trial.

It necessarily follows that until the time has elapsed in which a suspensive appeal may be taken a judgment is non-executory. In the instant case, the time in which to take a suspensive appeal had not even commenced to run. Consequently, the plaintiffs' partition judgment was not executory when execution was attempted; therefore, the execution was premature and without legal effect.

Although the cases of *Nassau Realty Co. v. Brown*, 332 So. 2d 206 (La. 1976), and *Boudreaux v. Allstate Finance Corporation*, 217 So.2d 439 (La. App. 1 Cir. 1968), deal with enforcement of judgments by means of writs of fieri facias, the rationale of these cases is pertinent, i.e., that a judgment is not executory until the delay allowed by law for taking a suspensive appeal has elapsed, and that the delay does not commence tolling until expiration of the time allowed for application of a new trial, which does not commence to run until notice of judgment is served on a domiciliary-served defendant against whom a default judgment has been taken.

In the *Nassau Realty* opinion the Supreme Court stated:

> "The default judgment rendered against the Browns on November 19, 1974 was based on per-

sonal service on Mrs. Brown and domiciliary service on Mr. Brown. Article 1913 of the Code of Civil Procedure requires that notice of the signing of a default judgment against a defendant on whom citation was not served personally shall be served on the defendant by the sheriff, by either personal or domiciliary service. Therefore, since Mrs. Brown was personally served, no notice of judgment was required to be served on her. On the other hand, since Mr. Brown was not served personally, notice of judgment was required to be served on him. Article 1974 provides that the delay for applying for a new trial shall be seven days, exclusive of legal holidays, and commences to run on the day after the judgment was signed except when notice of the judgment is required under article 1913 in which event the delay for applying for a new trial commences to run on the day after the sheriff has served notice of judgment. Thus, the delay for applying for a new trial commenced to run on November 20, 1974 insofar as Mrs. Brown is concerned; however, it never commenced to run in regard to Mr. Brown, as he was not served with a notice of judgment as required by article 1913."

The Court then held:

"In the instant case, therefore, the delay for taking a suspensive appeal by Mr. Brown had not elapsed when the Brown property was seized and ordered sold under a writ of fieri facias. Hence, it was premature and constituted a wrongful seizure. La.

Code Civ. P. arts. 1913, 1974, 2123, 2252. Mr. Brown is entitled to have this illegal seizure dissolved as prayed for in his petition for injunctive relief filed on December 5, 1975 and rejected by the district court. La. Code Civ. P. art. 2298 (1)." (footnote omitted)

The court in *Moses v. American Security Bank of Villa Platte*, 222 So.2d 899 (La.App. 3 Cir. 1969), held that:

"Article 1913 provides that the defendant must be given notice by service by the Sheriff of the signing of a default judgment obtained against him on the basis of domiciliary service.

"The delay to apply for a new trial, Article 1974, or for an appeal (Kinchen v. Kinchen, La.App., 1st Cir., 211 So.2d 91; Viator v. Grain Dealers Mut. Ins. Co., La.App. 3d Cir., 178 So.2d 378), does not commence to run until such notice is given. No notice of judgment whatsoever had been given to the defendants before their suit to dissolve the illegal seizure or before the judgment entered below. Since the delay to take a suspensive appeal had not commenced to run, the seizure was therefore at all times premature up to and including the time of the judgment dissolving it now appealed from." (footnote omitted)

In *Boudreaux v. Allstate Finance Corporation*, 217 So.2d 439 (La. App. 1 Cir. 1968), this court said, in holding that the suspensive appeal was timely,:

"Since the matter was taken under advisement by the trial court, the delays for applying for a new trial did not commence to run until notice of judgment was served upon defendant. LSA-C.C.P. Article 1913. It is patent on the face of the record that no such notice was in fact served. Consequently the delay allowed for applying for new trial never commenced to run. LSA-C.C.P. Article 1913. Articles 1974 and 2123, LSA-C.C.P. in effect provide that the delays for appealing either suspensively or devolutively do not commence tolling until expiration of the delay allowed for application for new trial. Since the 15 day delay allowed by law for taking a suspensive appeal, LSA-C.C.P. Article 2123 never commenced to run, it necessarily follows that it never expired and defendant's suspensive appeal was timely taken and perfected."

The cases relied upon by the appellants are distinguishable. See *e.g. Wetherbee v. Lodwick Lumber Co.*, 194 La. 352, 193 So. 671 (1940); *Hartson v. Flaty*, 192 La. 782, 189 So. 134 (1939).

In *Wetherbee* the judgment under consideration was not a default judgment. The delay for taking a suspensive appeal had elapsed, and the defendant only took a devolutive appeal. The writ of fieri facias was not issued until five months after the partition judgment. The judgment had clearly become executory. The court merely holds that the validity of a sale made in the execution of a judgment after it became executory is not affected by a subsequent reversal of the judgment on devolutive appeal.

In *Hartson*, the auction sale was after the partition judgment had become executory. The defendants were duly cited and represented by an attorney. The question of notice of judgment was not involved.

In those two cases, premature executions of executory judgments were involved; there were no legal impediments to the commencement of the tolling of the delay for an appeal. In the instant case, it is a question of a premature execution of a non-executory judgment; there were legal impediments to the beginning of the running of the delay for a suspensive appeal.

We hold that the attempted execution of the judgment herein was premature and constituted a wrongful execution of a judgment which was not executory. The sheriff's sale was not legally authorized and, therefore, it is null and void and without legal effect.

The commission issued by the clerk of court directing the sheriff to sell the property at public auction is likewise premature, and also must be set aside as null and void.

Although the trial court held the judicial sale to be invalid, it upheld the validity of the partition judgment.

The basis for the claim of nullity is that there was an invalid default judgment rendered against the defendants in the partition proceeding. The opponents contend that the evidence submitted at the trial of the confirmation of default was legally insufficient to support a judgment. They complain that there is no evidence to establish title in the persons named in the judgment. An examination of the

record reveals that there were introduced into evidence certain documents concerning title to the property, such as a sale from Odeia Cheramie Pierce to Numa Guidry of a 1/6th interest in the subject property. There was also filed a copy of the Judgment of Possession in the Succession of Andrew A. Cheramie, August 19, 1955. The opponents do not question the acuracy of ownership or the interest of any of the parties named in the default judgment. They do not claim that the ownership and the undivided interests set out in the judgment are incorrect. In a partition suit it is unnecessary for a plaintiff to establish a complete chain of title, both to himself and the defendants, where the respective interests are not denied. It is not necessary that forced heirs have their ownership recognized by a judgment of possession as a prerequisite to bringing a partition proceeding, particularly where there is no genuine dispute over title. The complaint that the entire partition proceedings are invalid because of the failure of the heirs to file an inheritance tax return as required by LSA-R.S. 47:2411 is without merit. The jurisprudence has established that a failure to comply with inheritance tax laws prior to the heirs taking possession of inherited property does not make their ownership invalid; it is valid, but the heirs have taken possession subject to the inheritance tax. *Bonvillain v. Richaud*, 153 La. 431, 96 So. 21 (1923).

It is clear from the record as a whole, and particularly the "Joint Stipulation of Facts", that the partition judgment is factually correct in all respects. The ownership of the subject property and the undivided proportional interest of each co-owner, as shown opposite their individual names, is accurate. There are no other owners or claimants. There is no contest at all that the property is not divisible in kind, and

that it must be partitioned by licitation. Neither is there a controversy as to any material fact. The opponents have presented no evidence to support their assertion that the judgment should be annulled. There is no proof that the trial judge did not have before him adequate legal evidence on which to base a confirmation of the default judgment based upon the evidence presented to him on November 5, 1974. That judgment is valid and there are no grounds for annulling it.

For the reasons assigned, the judgment of the trial court is affirmed. The costs are to be shared equally by the plaintiffs-appellants and the defendants-appellees.

AFFIRMED.

APPENDIX C - DISSENTING AND CONCURRING OPINION

NUMA GUIDRY, ET AL — STATE OF LOUISIANA

VERSUS — COURT OF APPEAL

MARK CHERAMIE, ET AL — FIRST CIRCUIT

NO. 11224

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF LAFOURCHE, LOUISIANA, HONORABLE WILMORE J. BROUSSARD, JR., JUDGE PRESIDING.

LOTTINGER, JUDGE. — Mar 21, 1977

DISSENTING AND CONCURRING OPINION

I concur with that portion of the majority's opinion that affirms the validity of the partition judgment, however, I respectfully dissent from the affirmance by the majority of the Trial Court judgment setting aside the judicial sale.

Inasmuch as notice of the partition judgment had not been served on the domiciliary served defendants in the partition suit, the partition judgment was not executory as to those defendants at the time of the judicial sale, the appeal time not having expired.

After much extensive research, no cases could be found that were directly on point.

In support of their position of setting aside the judicial sale because the judgment was not executory, the majority cites: *Nassau Realty Co., Inc. v. Brown*, 332 So.2d 206 (La. 1976); *Moses v. American Security Bank of Ville Platte*, 222 So.2d 899 (La. App. 3rd Cir. 1969); and *Boudreaux v. Allstate Finance Corporation*, 217 So.2d 439 (La. App. 1st Cir. 1968). These cases were either injunctions to arrest the execution of a writ or a suit to dissolve. Importantly the judicial sale had not taken place.

More in line with the facts of this case, though not directly on point is *Alfano v. Franek*, 159 La. 498, 105 So. 598 (1925), wherein the court said:

> "A sale made under the execution of a writ or process prematurely issued cannot be annulled solely on that ground.
>
> "Conceding, therefore, that the sheriff was not authorized to advertise and sell the property until the judgment of this court had been returned and filed in the lower court, it was the duty of appellants to have taken the necessary steps to prevent the said sale. They could not remain silent, permit the execution of the process to go forward, and then, after the sale, be heard to say that the execution and sale were premature."

In the instance case, the judicial sale was duly advertised in the official journal of the parish, and took place with the defendants doing nothing to stop it. They should not now be heard to complain.

Since notice of judgment had not been served, the appeal

time as to some defendants had not yet run, but had run as to those personally served. As to those domiciliarily served, they could and did appeal. The majority affirms the judgment of partition, but yet in essence orders another sale, thus granting to those defendants a second chance.

The better rule is that expressed in *Alfano*, supra, in that "a sale made under the execution of a writ or process prematurely issued cannot be annulled solely on that ground."

For these reasons I concur in part and dissent in part.

APPENDIX D - OPINION OF JUDGE SANDERS

NUMA GUIDRY, ET UX

V. SUPREME COURT OF LOUISIANA
NO. 59,970

MARK CHERAMIE, ET AL

ON WRIT OF CERTIORARI, OR REVIEW, TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF LAFOURCHE

MONDAY, DEC 19 1977

SANDERS, Chief Justice.

The issue to be determined here is the validity of a judicial sale of immovable property to effect a partition under a commission prematurely issued ordering the sale of the property.

Having been stipulated by the parties, the facts are not at issue. Plaintiffs brought suit for partition by licitation of property they owned with defendants. Three of the defendants in the partition suit had personal service; the others received domiciliary service.

Defendants in the partition suit filed no pleadings, and, on June 21, 1974, a preliminary default was entered against all defendants. On November 5, 1974, the default was confirmed. No notice of the default judgment was served on any defendant.

On the same day the default judgment was signed, the

plaintiffs sought to execute the judgment, and they had the clerk of court issue a commission to the sheriff to sell the property.

After advertisement, the property was sold at public auction for $40,000, on December 11, 1974, to Numa Guidry, Robert J. Guidry, and Dick J. Guidry.

The defendants filed opposition when the partition came on for homologation. After a hearing on September 20, 1976, the trial court set aside the judicial sale in the partition suit; denied the homologation of the partition; affirmed the validity of the judgment of partition; and denied defendants' motion for a new trial.

Plaintiffs suspensively appealed, and the Court of Appeal affirmed the district court judgment. 345 So.2d 157 (1977). On application of the plaintiffs, we granted writs to review the judgment insofar as it set aside the judicial sale. La., 346 So.2d 714 (1977).

After a careful review of the law and the proceedings in this case, we have determined that the lower courts erroneously invalidated the judicial sale.

The lower courts found the judicial sale invalid because the defendants who received domiciliary service were not served with the notice of the default judgment required by Louisiana Code of Civil Procedure Article 1913, which provides in pertinent part:

> "Notice of the signing of a default judgment against a defendant on whom citation was not

> served personally, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service."

On the basis of this article, the lower courts found that the delays for application for a new trial and the taking of a suspensive appeal did not begin to run against those defendants who received only domiciliary service until such time as they were served with notice of judgment required by the article. LSA-C.C.P. arts. 1913, 1974, 2087, 2123. Thus, the judgment while valid was not final as to those defendants.

The sale of property to effect a partition is merely a preliminary step to the partition itself. In reality, the partition is the division of the proceeds from the sale of the property. Hollingsworth v. Caldwell, 195 La. 30, 196 So. 10 (1940); Bickham v. Pitts, 185 La. 930, 171 So. 80 (1936); Dees v. Tildon, 2 La. Ann. 412 (1847). By their rule opposing the homologation of the partition, defendants attacked both the judgment of the partition and the judicial sale. In its judgment of September 20, 1976, the district court upheld the validity of the partition judgment; annulled the sale because of lack of notice to some defendants; and denied defendants' motion for a new trial. Defendants did not appeal this judgment. Thus, the judgment became final insofar as it upheld the validity of the partition judgment. LSA-C.C.P. arts. 1974, 2087, 2123.

In the present case, despite defendants' contention that, due to their lack of notice of the judgment of default, they were unable to attack the judgment of partition and sale, such is not the case. The defendants were allowed to attack the judgment of partition and sale in their opposition of the

homologation. At that point, the judgment of partition was upheld, and defendants chose not to appeal. That portion of the judgment declaring the partition valid became final.

It is a well-settled principle of law in our jurisdiction that a judicial sale made under a writ or process prematurely issued cannot be annulled solely on the ground of prematurity. Gentilly Development Co. v. Carbajal, 168 La. 786, 123 So. 325 (1929); Alfano v. Franek, 159 La. 498, 105 So. 598 (1925); Wheeling Pottery Co. v. Levi, 48 La. Ann. 777, 19 So. 752 (1896); Regan v. Washburn, 39 L.Ann. 1071, 3 So. 178 (1887). As to the present sale, the failure of notice became a mere irregularity which was cured by expiration of the time in which defendants could have taken a suspensive appeal. LSA-C.C.P. arts. 1974, 2087, 2123.

For the reasons assigned, that portion of the judgment of the Court of Appeal affirming the Seventeenth Judicial District Court's judgment setting aside the judicial sale in the partition suit and denying the homologation of the partition is reversed, and the case is remanded to the Seventeenth Judicial District Court, Parish of Lafourche for further proceedings consistent with law and the views herein expressed.

APPENDIX E - PER CURIAM

SUPREME COURT OF LOUISIANA

NUMA GUIDRY, ET UX

VERSUS NO. 59,970

MARK CHERAMIE, ET AL

PFC
JWS
FWS
AT Jr
JAD Jr
WFM Jr
JLD

PER CURIAM

In their application for rehearing, defendants allege that they filed an answer to plaintiffs' appeal to the Court of Appeal. They attach a copy of that answer. Thus, it appears that the statement in our opinion that defendants did not appeal is in error.

Actually whether defendants had or had not appealed the portion of the judgments adverse to them, i.e., upholding validity of the judgment ordering the partition and denying their motion for a new trial with respect thereto, the finality of such judgment in either event would have *succeeded* the partition sale. [Considering that defendants had appealed, by

way of answer to plaintiffs' appeal, that portion did not become final until after the unfavorable judgment in the Court of Appeal.]

The sale we find valid even though made under a writ of process prematurely issued was one which preceded defendants' rule and judgment thereon.

Contrary to the not unreasonable inference which might be gleaned from our opinion, the reasons for our holding are thus unaffected by defendants' appeal (or non appeal) and our erroneous observation that defendant did not appeal the post sale judgment on rule did not affect the result in this case.

APPENDIX F - NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF LOUISIANA

No. 59,970

NUMA GUIDRY, ET UX.

versus

MARK CHERAMIE, ET AL.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mark Cheramie, et al. hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, reversing and remanding the decision of the Court of Appeal for the First Circuit, State of Louisiana, entered February 17, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

PUGH, LANIER & PUGH

BY: S/ John L. Lanier
John L. Lanier
504 St. Louis Street
Thibodaux, Louisiana 70301

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

By: S/ Charles M. Lanier
Charles M. Lanier
Harvey D. Wagar, III
Margaret Ann Brown
1300 Hibernia Bank Building
New Orleans, Louisiana
70112

PROOF OF SERVICE

I hereby certify that on this 12th day of May, 1978, a copy of the Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, to M. Arnaud Pilie, 204 Richards Building, New Orleans, Louisiana 70112, Attorney for appellees, Numa J. Guidry and Mercedes Cheramie Guidry. I further certify that all parties required to be served have been served.

s/ Charles M. Lanier
Charles M. Lanier

SUPREME COURT OF LOUISIANA
FILED: MAY 12, 1978

s/ Andrew Falcon
Harold A. Moise, Jr.
Clerk

APPENDIX G - CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT XIV, SECTION I TO THE UNITED STATES CONSTITUTION

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1231

Types of service, time of making

Service of citation or other process may be either personal or domiciliary, and except as otherwise provided by law, each has the same effect.

Service, whether personal or domiciliary, may be made at any time of day or night, including Sundays and holidays.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1232

Personal service

Personal service is made when a proper officer tenders the citation or other process to the person to be served.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1233

Same; where made

Personal service may be made anywhere the officer making the service may lawfully go to reach the person to be served.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1234

Domiciliary service

Domiciliary service is made when a proper officer leaves the citation or other process at the dwelling house or usual place of abode of the person to be served with a person of suitable age and discretion residing therein as a member of his domiciliary establishment.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1913

Notice of judgment

Notice of the signing of a default judgment against a defendant on whom citation was not served personally, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service.

Except as otherwise provided by Article 3307, when a case has been taken under advisement by the court notice of the signing of a final judgment therein shall be mailed by the clerk of court of the parish where the case was tried to the

counsel of record for each party, and to each party not represented by counsel.

If, at the conclusion of a trial a case is not taken under advisement but the court does not sign a judgment at the time, a party may make a request of record for notice of the date when the judgment was signed; and when such a request is made, the clerk shall mail such notice to the party requesting it or to his counsel of record.

The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed.

Except as otherwise provided in the first three paragraphs of this article, notice of the signing of a final judgment is not required.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 1974

Delay for applying for new trial

The delay for applying for a new trial shall be seven days, exclusive of legal holidays. Except as otherwise provided in the second paragraph hereof, this delay commences to run on the day after the judgment was signed.

When notice of the judgment is required under Article 1913, the delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 2123

Delay for taking suspensive appeal

Except as otherwise provided by law, an appeal that suspends the effect or the execution of an appealable order or judgment may be taken, and the security therefor furnished, only within thirty days of:

(1) The expiration of the delay for applying for a new trial. as provided by article 1974, if no application has been filed timely;

(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or

(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914.

LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLE 2087

Delay for taking devolutive appeal

Except as otherwise provided in this Article or by other law, an appeal which does not suspend the effect or the execution of an appealable order or judgment may be taken within sixty days of:

(1) The expiration of the delay for applying for a new trial, as provided by Article 1974, if no application has been

filed timely;

(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or

(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914.

When a devolutive appeal has been taken timely, an appellee who seeks to have the judgment appealed from modified, revised, or reversed as to any party may take a devolutive appeal therefrom within the delays allowed in the first Paragraph of this Article or within ten days of the mailing by the clerk of the notice of the first devolutive appeal in the case, whichever is later.